No. 02-361

IN THE

Supreme Court of the United States

UNITED STATES, *et al.*,

Appellants,

v.

AMERICAN LIBRARY ASSOCIATION, INC., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF *AMICUS CURIAE* THE BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW IN SUPPORT OF APPELLEES

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INTEREST OF *AMICUS CURIAE*

The Brennan Center for Justice at New York University School of Law ("Brennan Center") submits this *amicus curiae* brief in support of the American Library Association, the Multnomah County Library Association and the other Appellees.[1]

The Brennan Center is a nonpartisan institute dedicated to implementing an agenda of scholarship, public education, and legal action that promotes equality and human dignity, while safeguarding fundamental freedoms. The Center was established in 1995 to honor the extraordinary legacy of Justice William J. Brennan, Jr.

The Brennan Center takes a particular interest in this case because it presents the Court with two important issues concerning the power of government to assert control over private speakers in subsidized speech settings. First, may the government censor constitutionally protected private speech in subsidized public libraries by ousting the professional editorial judgment of local librarians and replacing it with judgments dictated by elected federal officials? Second, may Congress displace librarians' judgments even when the constitutionally protected private speech is privately funded?

The Brennan Center has participated in a series of cases before this Court involving the relationship between

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1. Pursuant to Supreme Court Rule 37.3(a), consent by the parties for the filing of this *amicus curiae* brief has been granted and their consents are being lodged herewith. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than *amicus*, has contributed monetarily to the preparation or submission of this brief.

the First Amendment and government speech subsidies, including as lead counsel in *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001), and as both counsel for *amici* and one of the *amici* in *Board of Regents of Univ. of Wis. v. Southworth*, 529 U.S. 217 (2000), and in *NEA v. Finley*, 524 U.S. 569 (1998). The Brennan Center is currently participating as co-counsel in three district court cases in which the unconstitutional conditions doctrine plays a prominent role: *McConnell v. FEC*, Civ. No. 02-582 (CKK, KLH, RJL) (D.D.C. argued Dec. 4-5, 2002) (three-judge court); *Dobbins v. Legal Servs. Corp.*, 01 Civ. 8371 (FB) (E.D.N.Y. filed Dec. 14, 2001); and *Velazquez v. Legal Servs. Corp.*, 985 F. Supp. 323 (E.D.N.Y. 1997), *aff'd in part, rev'd in part*, 164 F.3d 757 (2d Cir. 1999), *aff'd*, 531 U.S. 533 (2001).

In this case, the district court declined to decide the unconstitutional conditions issues, preferring to rule on forum grounds. *American Library Ass'n v. United States*, 201 F. Supp. 2d 401, 490 n.36 (E.D. Pa. 2002) (three-judge court). The Center believes that the district court's forum analysis is correct and that this Court need not reach the unconstitutional conditions issues. However, in the event that the Court determines to address these issues, the Center files this *amicus curiae* brief with the hope that its perspective on the unconstitutional conditions doctrine will assist the Court.

SUMMARY OF ARGUMENT

Under this Court's unconstitutional conditions jurisprudence, the law challenged in this appeal—the Children's Internet Protection Act—cannot survive because it conditions the receipt of government funding on the sacrifice of fundamentally important First Amendment rights. The law wreaks this constitutional havoc in the public library, a uniquely important institution in our democratic culture whose defining feature is its solemn promise to provide each citizen with equal and unfettered access to explore, within the constraints of budget and the professional judgment of librarians, the sweep of human thought and experience.

This Court's unconstitutional conditions precedents have consistently recognized that the substantial power of the government's purse is ultimately constrained by the First Amendment—the government cannot purchase the First Amendment rights of those who participate in government-funded programs, whether the setting is the public university, as in *Keyishian v. Board of Regents of Univ. of State of N.Y.*, the public airwaves, as in *FCC v. League of Women Voters*, or the courts, as in *Velazquez*. Where a challenged law distorts the traditional functioning of private expression in a forum that is essential to the functioning of a free society, this Court has made clear that the law must fall.

Just as in those landmark subsidy cases—where one law told professors what to teach, one law told the media what to say, and one law told lawyers what to argue—the law challenged here imposes state-sponsored censorship that tells library patrons what they can read, what they can think, and what they can view in their local public library. The censoring software mandated by the law bars research on a variety of subjects: certain churches and religious groups, certain political candidates

and municipal governments, certain health issues and scientific matters, information about educational and employment opportunities, and even facts about sports and travel. By interfering in this way with the work of researchers, scholars, librarians, and web site publishers, the law effectively scissors out—on command of the national government, and without regard to a librarian's professional judgment or a local community's need—key chapters in the dynamic and vast encyclopedia of the Internet. Under the unconstitutional conditions doctrine, this extreme distortion of the library function plainly violates the First Amendment.

An equally troubling aspect of the challenged law is its application to every single computer in a public library—even those computers the library pays for with its own private funds. At least since *Regan v. Taxation With Representation of Wash.* and *League of Women Voters*, this Court has made absolutely clear that the unconstitutional conditions doctrine does not allow the government to condition the receipt of a subsidy on the sacrifice of private expression that is privately financed—the government must always afford speakers an adequate channel for such expression. The government insists in this case that libraries possess such an adequate channel in that they remain free to operate unfiltered computers in physically separate library facilities. Even if the challenged law permitted this, and it does not, forcing researchers to travel to remote facilities and to forego other key library resources, when the government offers no constitutionally cognizable justification, would impose an undue burden on researchers, make it less likely that valuable web sites will ever be accessed, and interfere with the administration and independence of libraries themselves. This interference with privately funded First Amendment–protected expression constitutes an additional and independent violation of the unconstitutional conditions doctrine.

ARGUMENT

I. BY REQUIRING FEDERALLY SUBSIDIZED PUBLIC LIBRARIES TO CENSOR PRIVATE SPEECH ON INTERNET-CONNECTED COMPUTERS, THE GOVERNMENT DISTORTS THE TRADITIONAL FUNCTION OF PUBLIC LIBRARIES IN VIOLATION OF THE UNCONSTITUTIONAL CONDITIONS DOCTRINE.

A. The Unconstitutional Conditions Doctrine Bars the Government from Using Its Subsidy Programs to Suppress Private Speech in Ways that Distort the Underlying Forum.

Throughout its unconstitutional conditions jurisprudence, this Court has held that the government may not use its subsidy programs to suppress private speech in a way that distorts the underlying forum for that speech, particularly where, as here, the integrity of the forum is essential to the functioning of a free society. *See, e.g.*, *Velazquez*, 531 U.S. 533; *Southworth*, 529 U.S. 217; *Finley*, 524 U.S. 569; *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Rust v. Sullivan*, 500 U.S. 173 (1991); *FCC v. League of Women Voters*, 468 U.S. 364 (1984).

In *League of Women Voters*, for example, the Court invalidated a federal law that had prohibited privately owned public broadcasting stations from engaging in editorializing if they received a grant of funds from the Corporation for Public Broadcasting. The Court held that since the purpose of public broadcasting is to offer a "wide variety" of views

on important social issues, the law's suppression of the opinions of one set of speakers—the station owners and managers—violated the First Amendment because "its effect is plainly to diminish rather than augment the volume and quality" of speech inherent in the medium of public broadcasting. 468 U.S. at 396, 399 (internal quotation marks and citation omitted).

In *Forbes*, another case involving public broadcasting, the Court upheld a restriction on government-subsidized private speech where the restriction advanced the proper functioning of the underlying forum for speech. The case involved the ability of a state-owned public television station, as a protected speaker, to exercise its First Amendment-based editorial judgment to exclude from a televised debate a Congressional candidate with insufficient political support. The Court reasoned that while a debate broadcast on public television is a form of government speech subsidy, the station's reasonable exclusion of certain speakers promoted effective public education by preventing a "cacophony" of candidate voices from garbling the intelligibility of the debate, an outcome that would have discouraged stations from airing future debates. 523 U.S. at 681.

In the context of public universities, the Court in *Rosenberger* overturned a University of Virginia policy that had prohibited student activity fees from being used to subsidize student publications that expressed religious editorial viewpoints. The Court's opinion made clear that this policy was unconstitutional because it undermined both the function of the university's student activity fee, which is to "encourage a diversity of views from private speakers," and the traditional function of the university itself, which is

to promote "free speech and creative inquiry." 515 U.S. at 834, 836. More recently, in *Southworth*, the Court upheld a public university's policy conditioning admission on a student's contributing to a fund that subsidized an array of campus groups, even though some students objected to being forced to fund certain groups' speech with which they disagreed. The Court sustained the policy because it advanced the university's mission of stimulating an intellectual marketplace of ideas both in and out of the classroom. 529 U.S. at 233.[2]

In *Velazquez*, the Court drew together this line of precedents to hold that when the government designs a subsidy program to facilitate the communication of private, nongovernmental speech—as it did in these cases—the First Amendment forbids the government from imposing restrictions to "suppress speech inherent in the nature of the medium," particularly where the medium—like public universities, public broadcasting and the courts—is integral to the functioning of a free society. 531 U.S. at 543, 546 (invalidating restriction on subsidized speech in part because it "threatens severe impairment of the judicial function").[3]

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2. In the context of government arts grants, the Court in *Finley* upheld a federal statute requiring the NEA to consider general standards of decency and respect in awarding grants to artists. The Court's decision rested in part on the fact that these non-binding standards did not interfere with the NEA's fundamental ability to pursue its mission of "encouraging freedom of thought, imagination, and inquiry," by subsidizing even private artistic expression "deemed indecent or disrespectful." 524 U.S. at 573, 580 (internal quotation marks and citations omitted).

3. *See also Rust*, 500 U.S. at 200 (upholding restriction applicable to government-subsidized physicians, but contrasting the university as "a traditional sphere of free expression so fundamental

(Cont'd)

Velazquez addressed the constitutionality of a law that had prohibited federally subsidized legal aid lawyers from challenging welfare reform laws in the course of representing individual clients seeking welfare benefits. The Court declared the law unconstitutional because it prevented lawyers engaged in advancing private speech from "advising their clients and . . . presenting arguments and analyses to the courts," thereby "distort[ing] the legal system by altering the traditional role of the attorneys." *Id.* at 544. The Court added that by "seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power." *Id.* at 545. The Court distinguished its decision in *Rust* upholding a speech restriction applied to government-subsidized family planning physicians, on the ground that the physicians were advancing governmental speech as contrasted with private speech. The legal aid subsidy program, on the other hand, was subsidized by government "to facilitate [the] private speech" of the lawyers' clients, "not to promote a governmental message." *Id.* at 542.

In *Velazquez*, and in each of the cases discussed above, the government had enacted a restriction on private speech in order to regulate the use of public funds. The *Velazquez* decision, taken together with the "unconstitutional conditions" cases discussed herein, establishes the principle that the First Amendment bars the government from imposing restrictions on private speech in subsidized speech settings

(Cont'd)
to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the . . . First Amendment.")

when the restrictions distort the proper functioning of the underlying forum, especially when the integrity of that forum is essential to a free society. *Id.* at 543.

B. Subsidized Speech in Public Libraries Deserves the Same Vigorous First Amendment Protection Afforded Subsidized Speech In Public Universities, Public Broadcasting Systems and the Courts.

Public libraries are analogous to public universities, public broadcasting systems, and the courts as vital institutions in a free society. For this reason, this Court should hold that Congress' power to control subsidized private speech in local public libraries is no greater than in these three settings.

Consider the example of public universities. In the university setting, the Court has consistently rejected government restrictions on speech that interfere with a public university's traditional role of educating students "through wide exposure to [a] robust exchange of ideas . . . rather than through any kind of authoritative selection." *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (internal quotation marks and citation omitted). *See also Rosenberger*, 515 U.S. at 835-36 (discussing heightened need to protect free speech in universities, which are "the center of our intellectual and philosophic tradition"). In so holding, this Court has declared academic freedom in this subsidized setting to be of "special concern" to the First Amendment:

> To impose any strait jacket upon the intellectual leaders in our colleges and universities would

> imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Keyishian, 385 U.S. at 603 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)).

This theory applies equally, if not more forcefully, to protect freedom of speech in public libraries. Like universities, America's public libraries have traditionally functioned as islands of free intellectual inquiry dedicated to the acquisition of knowledge by an autonomous citizenry. As the "principal locus" of our freedom to study, explore and test the full range of human thought and experience, libraries perform a unique institutional role; they allow us to engage in purely voluntary "self-education and individual enrichment," limited not by government restraints but merely by the boundaries of our own curiosity and imagination. *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 868, 869 (1982). *See also id.* at 915 (Rehnquist, J., dissenting) (noting that "public libraries" are "designed for freewheeling inquiry"). As the past president of the New York Public Library, Vartan Gregorian, recently observed:

> Libraries contain the heritage of humanity, the record of its triumphs and failures, its intellectual,

> scientific and artistic achievements and its collective memory. They are a source of knowledge, scholarship and wisdom. They are an institution, withal, where the left and the right, God and the Devil, are together classified and retained, in order to teach us what to emulate and what not to repeat. Libraries are, thus, the most tolerant institutions we have, the good and the evil are here, and the library makes no value judgments about them.

Vartan Gregorian, *Libraries as Acts of Civic Renewal*, Address at the Kansas City Club (Oct. 17, 2002), *at* http://www.kclibrary.org/gregorianspeech (last visited Feb. 9, 2003).

Libraries play an institutional role similar to that of universities by providing a forum for the unfettered intellectual inquiry and exploration that is essential to the functioning of a free and self-governing society. Indeed, this Court has recognized that, unlike the classroom, where faculty necessarily exercise some degree of control over the content of discussion and debate, libraries offer unique opportunities both to "discover areas of interest and thought not covered by [any] prescribed curriculum," and to "test or expand upon ideas presented . . . in or out of the classroom." *Pico*, 457 U.S. at 869 (internal quotation marks and citation omitted). In this respect, the heightened constitutional protection afforded speech within the privileged sphere of the university should apply with even greater force to bar the government from censoring subsidized private speech in public libraries. As in *Keyishian*, merely because the government subsidizes professors in public universities, or librarians in public libraries, it may not exercise a degree of control over their First Amendment activities.

C. By Requiring Public Libraries to Censor Private Speech, the Government Distorts the Traditional Function of Public Libraries in Violation of the Unconstitutional Conditions Doctrine.

The government, through the Children's Internet Protection Act ("CIPA"),[4] censors private speech by requiring public libraries that receive either of two forms of federal benefits—federal grants pursuant to the Library Services and Technology Act[5] ("LSTA"), or discounts for Internet access pursuant to the Telecommunications Act of 1996[6] ("E-rate program")—to certify that they are using on all Internet-connected computers a "technology protection measure that prevents patrons from accessing visual depictions that are obscene, child pornography, or in the case of minors, harmful to minors." *American Library Ass'n*, 201 F. Supp. 2d at 407 (quoting 20 U.S.C. § 9134(f)(1)(A) (LSTA) and 47 U.S.C. § 254(h)(6)(B) & (C) (E-rate program)) (internal quotation marks omitted).

The law's explicit intent is to ban three very limited and narrow categories of visual expression from the Internet in public libraries—obscenity, child pornography and visual depictions harmful to minors—each of which falls beyond the scope of First Amendment protection. *See, e.g., New York v. Ferber*, 458 U.S. 747 (1982) (holding child pornography not entitled to First Amendment protection). However, as the three-judge district court found, CIPA's ultimate effect is to require public libraries, by installing and operating filtering software, to necessarily block "a very substantial amount"

4. Pub. L. No. 106-554, Div. B, Tit. XVII, 114 Stat. 2763A-335 (2000).

5. 20 U.S.C. § 9101, *et seq.*

6. 47 U.S.C. § 254(h).

of constitutionally protected speech based solely on its content. *American Library Ass'n*, 201 F. Supp. 2d at 448, 490. *See also id.* at 454 ("Software filters, by definition, block access to speech on the basis of its content."). This direct censorship of valuable speech is caused by the inherent technological limitations of filtering software programs, which, as the district court found, "erroneously block a huge amount of speech that is protected by the First Amendment." *Id.* at 448. The district court explained further:

> Any currently available filtering product that is reasonably effective in preventing users from accessing content within the filter's category definitions will necessarily block countless thousands of Web pages, the content of which does not match the filtering company's category definitions, much less the legal definitions of obscenity, child pornography, or harmful to minors. Even [the government's] expert witness . . . found that between 6% and 15% of the blocked Web sites in the public libraries that he analyzed did not contain content that meets even the filtering products' own definitions of sexually explicit content, let alone CIPA's [narrower] definitions.

Id. See also id. at 427-37 (describing how filtering software necessarily blocks more information than it is intended to block).

Following are just some of the numerous types of constitutionally protected speech that the district court found

blocked by the leading filtering software programs available to public libraries:

- *Speech by and about churches and religious groups*, including web sites for a Knights of Columbus chapter affiliated with St. Patrick's church in Fallon, Nevada; a Christian orphanage in Honduras; and a lesbian and gay Jewish Center in California;

- *Speech about politics and government*, including web sites for individual candidates for state and local office in Massachusetts and California; the government of Adams County, Pennsylvania; Wisconsin Right to Life; and an anti-death penalty group in Denmark;

- *Speech about health issues*, including web sites about allergies and halitosis, for the Willis-Knighton Cancer Center in Louisiana, and about health information provided by Columbia University;

- *Speech about education and careers*, including web sites about home schooling, about careers for social workers, about careers in dentistry, and for a gay and lesbian chamber of commerce in Nevada;

- *Speech about sports*, including web sites about the first African American professional hockey player, an Australian football club, and a fan's site for the Toronto Maple Leafs hockey team; and

- *Speech about travel*, including web sites for a bed and breakfast in North Carolina, a nature tour operator in Namibia, a fly fishing outfitter in Canada, and a travel service for gay men.

Id. at 446-47.

This censorship interferes with the ability of government-subsidized public libraries to communicate a set of constitutionally protected private messages to their patrons in the same way that the law in *Velazquez* interfered with the ability of government-subsidized lawyers to communicate a client's private message to the courts. In both instances, the censorship suppresses speech vital to the proper functioning of the relevant forum. *See Velazquez*, 531 U.S. at 545 (concluding restriction on lawyers' speech prohibits "expression upon which courts must depend for the proper exercise of the judicial power").[7] This interference alters the usual functioning of public libraries, in violation of the unconstitutional conditions doctrine, by requiring libraries to do exactly what they are not supposed to do: censor

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7. The Supreme Court has recognized that the Internet, itself, creates "a vast democratic for[um]" for the communication of private speech by "millions of readers, viewers, researchers, and buyers." *See Reno v. ACLU*, 521 U.S. 844, 853, 868 (1997). By subsidizing participation in this forum through the LSTA and E-rate programs, the government facilitates the communication of private speech and not any particular governmental message. *See* Section I.D. below. The speakers in this case therefore include not only the public libraries, but also the censored web site publishers, librarians, library patrons, and donors to the libraries. The effect of filtering software in censoring thousands of Internet publications has been characterized by one court as the equivalent of blackening out significant portions of a set of encyclopedias. *See Mainstream Loudon v. Board of Trs. of Loudon County Library*, 2 F. Supp. 2d 783, 793 (E.D. Va. 1998) (*Loudon I*).

valuable information that they would make available but for a government directive.

As the government concedes in this case, America's diverse public libraries share a common mission of providing patrons with a wide array of information and ideas. Brief for the United States (hereinafter "U.S. Br.") at 20 ("Consistent with their missions, public libraries seek to provide a wide array of information to the public."). *See also American Library Ass'n*, 201 F. Supp. 2d at 420. This mission requires public libraries to provide local communities with access to "materials and information presenting all points of view on current and historical issues." *American Library Ass'n*, 201 F. Supp. 2d at 420 (quoting American Library Ass'n, Library Bill of Rights (1980)). Although resource limitations obviously thwart public libraries from providing universal coverage within the space of their physical collections, public libraries nevertheless attempt to assist "patrons in obtaining access to *all* materials except those that are illegal," by utilizing interlibrary loan systems, referrals to other libraries and, today, with the help of the federal government, the Internet. *Id.* at 421 (emphasis added).

Insofar as local librarians, as a practical matter, must make content-based decisions about which books to acquire for their libraries' physical collections, these decisions are guided by professional standards that strive for balance in a library's collection, while counseling acquisition of materials of "requisite and appropriate quality. . . . that would be of the greatest direct benefit or interest to the community." *Id.* These standards bar librarians from making collection decisions based on "'partisan or doctrinal disapproval'" of materials. *Id.* at 420 (quoting American Library Ass'n, Library Bill of Rights). *See also Pico*, 457 U.S. at 870 (barring elected officials from removing school library books

based on "narrowly partisan or political" objections). These standards state that librarians must provide access to "'the widest diversity of views and expressions, including those that are unorthodox or unpopular with the majority,'" and that they must "'contest encroachments upon th[e] freedom [to read] by individuals or groups seeking to impose their own standards or tastes upon the community at large.'" *American Library Ass'n*, 201 F. Supp. 2d at 420 (quoting American Library Ass'n, Freedom to Read Statement (2000)). *See also Mainstream Loudon v. Board of Trs. of Loudon County Library*, 24 F. Supp. 2d 552, 563 (E.D. Va. 1998) (*Loudon II*) (quoting local government resolution stating purpose of county's public library system is to offer "the widest possible diversity of views and expressions" and not to censor ideas).

Here, the government effectively forces public libraries to abandon this mission by requiring them to deny patrons access to a substantial amount of valuable information on the Internet that the libraries have decided should be made available. It is no answer to say that since librarians are able to exercise proper editorial judgments about which books to acquire for their libraries' collections, the federal government can dictate those judgments. *See* U.S. Br. at 50. This is clear from *Velazquez*, where this Court struck down a regulation precluding civil legal aid lawyers from making certain arguments in court. The fact that legal aid lawyers exercise their professional judgment, in ways similar to librarians, in determining what arguments to advance in court on behalf of their clients, did not authorize the federal government to dictate those judgments merely because the government subsidized the lawyers' speech. *See* 531 U.S. at 544.

To the contrary, by usurping the professional editorial judgment of local librarians about the material that should be kept in public libraries, and replacing it with judgments dictated by elected federal officials, CIPA distorts the basic functioning of public libraries. *See* U.S. Br. at 20 (conceding that to "fulfill their traditional missions, public libraries must have broad discretion to decide what material to provide their patrons.").[8] A librarian's exercise of her editorial discretion is a form of protected speech activity. *Cf. Forbes*, 523 U.S. at 674 ("When a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity."). By supplanting that discretion with the government's decision to remove materials from a library's collection—a decision that is imposed without regard to whether censored web sites contain valuable information that is protected by the Constitution and of direct benefit or interest to the community—the government violates the First Amendment. *Cf. Finley*, 524 U.S. at 580-81, 586 (upholding decency and respect criteria for government arts grants because criteria are "merely hortatory" and do not supplant the aesthetic judgments made by expert panelists in awarding grants).

The government suggests that by subsidizing Internet access Congress was merely furthering public libraries' "traditional role of obtaining requisite and appropriate material for educational and informational purposes,"

8. The district court observed that, among the various ways that public libraries have voluntarily chosen to respond to the availability of sexually explicit content on the Internet, approximately 93% have *rejected* using filtering software. *American Library Ass'n*, 201 F. Supp. 2d at 406. Forcing libraries to install filtering software would consequently have a dramatic effect on the usual operation of public libraries in America.

U.S. Br. at 50, however, this argument is unavailing for at least two reasons. First, the government's brief cites no support in the statute or the legislative record for this proposition. Second, CIPA's speech regulation, rather than merely limiting the type of material that may be *obtained* with federal funds, is more accurately described as an attempt by Congress to override the professional judgments of local librarians by forcing them to *remove* material that they have already decided to obtain.

D. *Rust* Does Not Apply in This Case, Because Only Private Speech Is at Stake.

The government's reliance on *Rust* for the proposition that CIPA is an appropriate law because it merely defines the limit and scope of a government subsidy program, U.S. Br. at 50, is misplaced. *See Velazquez*, 531 U.S. at 547 (rejecting government attempt to "recast a condition on funding as a mere definition of its program" because the condition implicates "central First Amendment concerns."). In *Rust*, the Court upheld federal regulations barring government-subsidized doctors from discussing abortion when providing family planning advice, explaining that the federal program, by definition, was designed to "lead to conception and childbirth." 500 U.S. at 193. In post-*Rust* cases, this Court has clarified that *Rust* does not apply in situations where, as here, the government subsidizes private speech, as contrasted with government speech intended to advance a particular governmental message. In *Velazquez*, for example, the Court explicitly distinguished *Rust* as relying on the "rationale that the counseling activities of the doctors under Title X amounted to governmental speech." 531 U.S. at 541. *See also Southworth*, 529 U.S. at 229 (explaining that unlike *Rust*, *Southworth* "does not raise the issue of the

government's right . . . to use its own funds to advance a particular message"); *Rosenberger*, 515 U.S. at 834 (distinguishing *Rust* as inapplicable in cases where the government "does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers").

In this case, the government does not, and could not, dispute that by designing the LSTA and E-rate programs to provide "Internet access to . . . libraries in low-income communities," *American Library Ass'n*, 201 F. Supp. 2d at 407, Congress has created a subsidy program not to communicate any particular governmental message, but to facilitate public libraries providing patrons with access to the "vast amount" of private speech available on the Internet. U.S. Br. at 3. *See also Reno v. ACLU*, 521 U.S. 844, 868 (1997) (stating that the Internet is a vast forum for private speech). Thus, unlike the regulations upheld in *Rust*, CIPA restricts private, nongovernmental speech. *Rust* consequently does not control this case. *See Velazquez*, 531 U.S. at 542-43.[9]

For the aforementioned reasons, the government's requirement that federally subsidized public libraries install

9. The government also misreads *Velazquez* as distinguishing *Rust* solely on the ground that "the role of lawyers supported by federal funds who represent clients in welfare disputes is to advocate *against* the government, and there was thus an assumption that counsel would be free of state control." U.S. Br. at 51-52 (emphasis in original). Rather, the *Velazquez* Court repeatedly stated its holding more broadly as relying on the "salient point" that, "like the program in *Rosenberger*," which did *not* involve speech against the government, "the LSC program was designed to facilitate private speech, not to promote a governmental message." *Velazquez*, 531 U.S. at 542.

filtering software on all computers, censoring a substantial amount of private speech, distorts the traditional functioning of public libraries in violation of the unconstitutional conditions doctrine.[10]

II. BY PROHIBITING PUBLIC LIBRARIES FROM USING THEIR OWN NON-FEDERAL FUNDS TO PROVIDE FULL ACCESS TO THE INTERNET, THE GOVERNMENT VIOLATES THE UNCONSTITUTIONAL CONDITIONS DOCTRINE.

By requiring public libraries to filter Internet access even on computers financed entirely with their own non-federal funds, the law imposes an additional unconstitutional condition. In *League of Women Voters*, the Court invalidated a statute that had imposed a flat ban against editorializing by privately owned public broadcasting stations that received federal grants. The Court explained that the statute imposed an unconstitutional condition because it failed to provide any mechanism allowing the stations to use private funds for First Amendment activity. The Court observed that a station receiving "only 1% of its overall income from [federal] grants is barred absolutely from all editorializing. . . . The station has no way of limiting the use of its federal funds to all noneditorializing activities, and, more importantly, is barred from using even wholly private funds to finance its editorial activity." 468 U.S. at 400.

10. It is not necessary for the Court to determine the precise level of scrutiny to apply in this case, because under any constitutional balancing test, no government purpose can justify the law's ban on private speech in public libraries. *See Watchtower Bible & Tract Socy. of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 122 S. Ct. 2080, 2088 (2002) (declining to decide precise standard of review, because regulation was invalid under any level of First Amendment scrutiny).

Much as in *League of Women Voters*, the law challenged here also violates the First Amendment by requiring a public library that receives federal funds to operate filtering software "with respect to *any* of its computers with Internet access" during "*any use* of such computers." 20 U.S.C. § 9134(f)(1); 47 U.S.C. § 254(h)(6)(B) & (C) (emphases added). This requirement imposes a flat ban against a library's use of even private funds to operate unfiltered computers in an effort to provide patrons with access to the full range of constitutionally protected speech on the Internet. This flat ban against the use of private funds to pursue First Amendment activity, on penalty of the loss of federal funding, imposes an unconstitutional condition on public libraries. *See League of Women Voters*, 468 U.S. at 399-400.

The government's attempt to rescue the statute by interpreting it to permit libraries to use non-federal funds to operate unfiltered computers, so long as they do so in physically separate facilities or branches, U.S. Br. at 51, fails for at least two reasons. First, the government's interpretation contradicts CIPA's plain terms, which expressly require a subsidized library to operate filtering software on all of its Internet-connected computers, without regard to funding source. Congress authorized no exceptions, including for privately funded computers. While courts have a duty to avoid constitutional questions through statutory construction, they are not "free to redraft statutory schemes in ways not anticipated by Congress solely to avoid constitutional difficulties." *Lowe v. SEC*, 472 U.S. 181, 213 (1985) (White, J., concurring). *See also Miller v. French*, 530 U.S. 327, 341 (2000) ("[T]he canon of constitutional doubt permits us to avoid such questions only where the saving construction is not plainly contrary to the intent of Congress.") (internal quotation marks and citation omitted). The government's

attempt to redraft CIPA in clear violation of Congress' explicit intent must be rejected.

Second, while the government's unauthorized interpretation of the statute should be disregarded, the interpretation itself conflicts with the First Amendment by imposing an undue burden on the rights of libraries, patrons, librarians, library donors, and web site publishers without any government justification. *See United States v. Playboy Entm't Group*, 529 U.S. 803, 812 (2000) ("The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans."). There is no serious question that requiring financially strapped public libraries in low-income communities to build or rent additional facilities, and to pay for net increases in utility, maintenance, administrative and personnel costs, would impose a substantial burden. In addition, requiring librarians, scholars and researchers to shuttle back and forth between physically separate facilities according to the particular thought in their mind or the topic they are trying to research, introduces a substantial additional level of burden (presenting a scenario having more in common with a Monty Python skit than with traditional scholarly inquiry).

Moreover, the government has offered no justification for imposing such a burden on the ability of public libraries to use their own private and other non-federal funds to facilitate private speech. The government argues that, under *Rust*, Congress may "ensure the integrity" of its LSTA and E-rate programs by requiring that federally funded and non-federally funded Internet-connected computers be housed in physically separate facilities. U.S. Br. at 51 (quotation marks

and citation omitted). However, *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540 (1983), and *League of Women Voters*, both indicate that physical separation between federally and non-federally funded activities is not required to ensure the integrity of government subsidy programs. And *Rust*, which upheld as reasonable a physical separation requirement in the setting of a federal family planning program, does not control this case.

Thus, in *Taxation With Representation*, this Court stressed that Congress may not unduly interfere with the ability of subsidized private speakers to use non-federal funds to pursue First Amendment activities. The Court held that Congress' requirement that certain tax-exempt entities establish a legally separate affiliate in order to conduct lobbying activities was "not unduly burdensome," given the government's interest in not subsidizing lobbying activities. 461 U.S. at 544 n.6. However, in a concurring opinion, Justice Blackmun warned that this holding was premised on the understanding that the government did not require any additional separation measures. *Id.* at 553 (Blackmun, J., concurring) (warning that the imposition of additional controls beyond bookkeeping separation "would negate the saving effect of [the legally separate affiliate avenue]" and pose intolerable burdens on the "constitutional right [of organizations] to speak and to petition the Government").

Similarly, in *League of Women Voters*, this Court reiterated that the First Amendment guarantees recipients of federal subsidies the right to use private funds to engage in First Amendment-protected speech. In overturning a law that had absolutely barred public broadcasting stations that accepted federal subsidies from editorializing, the Court stated that the constitutional violation caused by the absolute

bar would be cured if Congress permitted stations to use non-federal funds "to establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds," i.e., Congress could require legal, but not physical, separation. 468 U.S. at 400.

Rust is the only decision of this Court upholding a requirement that "physically separate" facilities be maintained in order to take advantage of the First Amendment right to use non-federal funds for protected activities. *Rust* holds that where separate physical facilities are shown to be necessary to preserve the fiscal integrity of a federal program and to prevent public confusion about who sponsors a particular program, a requirement of physical separation may be justified, despite the economic burden it imposes on the use of non-federal funds. 500 U.S. at 188-90.

However, as discussed in Section I.D. above, *Rust* does not apply here. *Rust* involved a subsidy program designed to communicate a particular governmental message, and the Court held that physical separation was justified by the government's need to avoid confusing the public about the content of the government's message. 500 U.S. at 188. But in programs such as CIPA, where government is not the "speaker," but rather is subsidizing private speakers, *Rust* does not apply. *See, e.g.*, *Velazquez*, 533 U.S. at 541; *Rosenberger*, 515 U.S. at 834. In the absence of a governmental message, this Court has never approved a requirement of physical separation like that suggested by the government in this case. Such a requirement would directly interfere with free expression in public libraries and is not justifiable. Under traditional First Amendment analysis, burdens on First Amendment freedoms will not be tolerated unless they: (1) advance an extremely important governmental interest, *see, e.g.*, *City of Ladue v. Gilleo*, 512 U.S. 43, 54 (1994)

(finding an asserted interest valid but not compelling); and (2) are no more extensive than necessary to advance the government's interest, *see Playboy*, 529 U.S. at 803. The government's physically separate facilities proposal fails both tests, because the government has no constitutionally cognizable justification for imposing such a burdensome requirement.

CONCLUSION

By requiring federally subsidized public libraries to censor private speech on Internet-connected computers, the government distorts the traditional function of public libraries in violation of the unconstitutional conditions doctrine. By prohibiting public libraries from using their own non-federal funds to provide full access to the Internet, the government also violates the unconstitutional conditions doctrine. The judgment of the district court should be affirmed.

Respectfully submitted,

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